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of the case.

ATTORNEY FOR APPELLANT:

MARTIN R. LUCAS

North Judson, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM BEAVER,

Appellant-Respondent,

vs.

DARLENE BEAVER,

Appellee-Petitioner.

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No. 75A05-0607-CV-351

APPEAL FROM THE STARKE CIRCUIT COURT

The Honorable Kim Hall, Presiding Judge

Cause No. 75C01-0310-DR-129

February 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

William Beaver appeals the modified decree of dissolution entered by the trial court after we remanded for clarification. Beaver asserts the court's modification "exceeds the mandate of" our opinion, (Appellant's Br. at 2), and thereby "violated the law-of-the-case doctrine." (*Id.* at 3.) We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

In Beaver's prior appeal, we set out the underlying facts:

The Beavers married in 1959. In 1989, the Beavers deeded eight-tenths of an acre to Shirlene Peterson. That same year, they filed bankruptcy. In 1991, the Beavers separated, and William moved in with Peterson. Darlene filed a petition for dissolution of marriage in October of 2003. After a hearing, the court dissolved their marriage in an order that provided in pertinent part:

The Court being duly advised finds:

* * * * *

(6) The parties have been married for over four decades and have each contributed income to the household from various sources. During some periods, Wife made the greater contribution. During other periods, Husband made the greater contribution. In 1989, the parties filed bankruptcy. The Court finds that, while married and residing together, the parties equally contributed to the household income and the acquisition of assets.

(7) The parties have been separated for approximately fourteen years. During this period of time, the parties each acquired various assets and the Court has considered same for the purpose of the division of property as contained herein.

(8) The parties agree, and the Court accepts their agreement, on the division of the following property:

(a) Wife shall be awarded the personal property in her residence at 8213 North Highway 23, Walkerton, Indiana, and the 1995 Pontiac Grand Prix, an arrow sign, antique bell, cedar chest, picture of Aunt Annie, Christmas ornaments, Great Aunt's green pitcher, and any bank accounts in her name.

(b) Husband shall be awarded his residence at 2866 North Taubinaubee Street, Walkerton, Indiana (although husband claims that he has no property interest in his residence), all of the personal property in his residence, the 1991 Dodge pickup truck, the 1996 Buick LeSabre, the 1998 Chevrolet pickup truck, (although husband

claims that he has no property interest in the vehicle), the Buick Park Avenue, (although husband claims that he has no property interest in the vehicle), his tools, the heavy equipment, the stock trailer, cattle and all other farming equipment located at 8213 North Highway 23, Walkerton, Indiana.

(9) The parties have not agreed upon the disposition of the following property; the real estate at 8213 North Highway 23, Walkerton, Indiana, the .8 of an acre lot on County Road 900 North, in Starke County, Indiana, the Husband's pension, any payment from Husband to Wife to balance the equalities between the parties, and a logo.

(10) The parties have not agreed upon the assumption of the following debts; the mortgage, taxes, and insurance on the Wife's residence, Wife's outstanding health care bills, and Wife's outstanding debt to J.C. Penny [sic].

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

(1) Wife is awarded her residence at 8213 North State Road 23, Walkerton, Indiana. In order to balance the equities between the parties, Husband shall owe Wife an amount equal to the balance of the mortgage on said property as of June 1, 2005, in the approximate amount of \$56,000.00. The Husband is required to pay the monthly mortgage payments to First Federal until June 1, 2006. Husband shall maintain any related mortgage life insurance. If the Husband has elected not to pay the balance of the mortgage on or before June 1, 2006, then he shall pay a lump sum to Wife equal to the amount of the mortgage on June 1, 2006. Thereafter, Husband shall execute a quit-claim deed from Husband to Wife for said property. Until the mortgage is paid in full, Husband shall continue to pay the taxes and insurance.

(2) Wife shall be responsible for the cost of the upkeep of her residence together with the payment of all utilities.

(3) Husband is awarded the .8 acre lot on County Road 900 North, in Starke County, Indiana.

(4) Husband is awarded any property interest that he has in his residence at 2866 Taubinaubee, Walkerton, Indiana.

(5) Wife is awarded all the personal properties located inside her residence, together with the 1995 Pontiac Grand Prix, an arrow sign, antique bell, cedar chest, picture of Aunt Annie, Christmas ornaments, Great Aunt's green pitcher, and any bank accounts in her name.

(6) Husband is awarded all of the personal property in his residence, the 1991 Dodge pickup truck, the 1996 Buick LaSabre,

the 1998 Chevrolet pickup truck, the Buick Park Avenue, his tools, all of the heavy equipment, including the backhoe, the stock trailer, cattle, all other farming equipment located at 8213 North Highway 23, Walkerton, Indiana, and his pension.

(7) Husband shall be responsible for the payment of Wife's outstanding health care bills, her J.C. Penny [sic] debt in the approximate amount of \$400.00, and shall maintain health care insurance on Wife until he pays off the mortgage on her residence.

* * * * *

(10) Each party is awarded any cash surrender value on any life insurance policy on his or her own life.

(11) Husband is awarded any bank account in his name.

Beaver v. Beaver, No. 75A05-0507-CV-380, slip op. at 2-4 (Ind. Ct. App. March 27, 2006).

We consolidated the issues William raised into one: “whether the trial court divided the marital assets unequally without making findings required to support an unequal distribution because it erroneously included non-marital items in the marital pot.” *Id.* at 2. Because the court did not assign values to many pieces of property, we were unable to determine whether the division of assets was equal. Nor were we able to determine “whether the trial court erroneously effectuated an unequal division of marital assets without findings to support an unequal division.” *Id.* at 9-10. Accordingly, we remanded for clarification.

On remand, the court did not accept new evidence or hold hearings. Rather, it entered the following order:

The Court issued a Decree of Dissolution on June 6, 2005. The Petitioner, Husband, appealed the division of marital assets in the Decree. The Court of Appeals of Indiana, on March 24 [sic], 2006, remanded for clarification. The Court after reviewing the evidence, the argument, the Wife's Proposed Findings of Fact, the Respondent's Proposed Findings, the law, and the Memorandum Decision of the Court of Appeals of Indiana is

now duly advised, and modifies the Decree of Dissolution to provide the following clarification:

FINDINGS OF FACT

- (1) The parties were duly married on March 18, 1959.
- (2) Both parties are residents of the State of Indiana, and of Starke County, and have been so continuously since the Petitioner filed her petition for dissolution of marriage in October 20, 2003.
- (3) All of the parties' children are fully emancipated adults and the Petitioner is not pregnant.
- (4) There has been an irretrievable breakdown of the marital relationship and the parties['] marriage should be dissolved and the parties returned to the condition of unmarried persons.
- (5) The parties have been separated for approximately seventeen (17) years.
- (6) The Wife resides at the marital residence, 8213 North Highway 23, Walkerton, Indiana.
- (7) The Husband resides at 2866 North Taubinaubee Street, Walkerton, Indiana.
- (8) The Husband has resided with Shirlene Peterson for the last seventeen (17) years.
- (9) The Husband gives his paycheck to Shirlene Peterson and she spends it.
- (10) The Husband is responsible for the dissipation of marital property. Although the Wife's Verified Asset Declaration, Plaintiff's Exhibit A, places the dissipation at approximately \$1,000,000.00, the Court finds that the dissipation was less. The Court finds that the dissipation, figured conservatively, was \$10,000.00 per year for the last seventeen years that the husband gave his paycheck to Shirlene Peterson, for a total of \$170,000.00.
- (11) The Wife and Husband owned .8 acre of property. They conveyed that property to Shirlene Peterson just prior to filing Bankruptcy in 1989. Wife testified that Husband convinced her to convey the property to Peterson for the purpose of concealing the asset from bankruptcy proceedings. Subsequently, after the bankruptcy was concluded, Peterson was to convey the property back to Husband and Wife. However, Husband moved in with Peterson and Peterson never conveyed the property back to Husband and Wife. Husband testified that Husband and Wife conveyed the property to Peterson in lieu of paying wages owed to Peterson. The Court finds Wife to be more credible regarding the reason for the conveyance of the property to Peterson. Nevertheless, the Court does not consider the property, valued at approximately \$15,000.00, to be part of the marital property.

- (12) The Court finds that the Husband intentionally concealed an asset from the bankruptcy proceeding and is attempting to conceal marital assets from these dissolution proceedings. The Court finds that the Husband's credibility regarding marital assets is highly questionable and therefore carries little weight.
- (13) The Husband testified that he resides with Shirlene Peterson, and has done so for seventeen (17) years. He claims to pay her "rent." He testified that he gives her his paycheck, "...and she spends it." The Court finds the Husband's testimony that he paid "rent" for seventeen (17) years to be incredible. Nevertheless, the Court does not consider the Husband's residence, valued at \$90,000.00, to be part of the marital property.
- (14) The Court has considered the present economic circumstances of each spouse, the conduct of the parties during the marriage as related to the dissipation of property, and the earning ability of the parties as related to a final division of property, and finds that an unequal division of the marital property is proper.
- (15) The Court assigns the following values to the marital property:
- (a) The residence at 8213 North Highway 23, Walkerton, Indiana Value - \$110,000.00, Mortgage - \$56,539.00, Equity - \$53,461.00.
 - (b) The Wife's personal property - \$1,500.00.
 - (c) The 1995 Pontiac Grand Prix - \$1,500.00.
 - (d) Miscellaneous items including an arrow sign, antique bell, cedar chest, picture of Aunt Annie, Christmas ornaments, and Great Aunt's green pitcher - \$2,000.00.
 - (e) The Wife's bank accounts - \$625.00.
 - (f) The Husband's personal property - \$8,000.00.
 - (g) The 1996 Buick LeSabre - \$1,000.00.
 - (h) The 1991 Dodge pickup truck - \$6,000.00.
 - (i) Tools - \$10,000.00.
 - (j) Backhoe - \$17,500.00.
 - (k) Stock Trailer - \$16,000.00.
 - (l) Cattle - \$3,300.00.
 - (m) Farming equipment - \$12,000.00 (includes one tractor - \$6,500.00, one tractor - \$4,000.00, implements - \$500.00, and a castrating machine - \$1,000.00).
 - (n) The Husband's bank accounts – unknown value.
 - (o) Cash surrender value of any life insurance for the Husband or the Wife – unknown value.
 - (p) The Husband's pension - \$4,500.00 per year, but no present value was established.

- (16) The parties agree, and the Court accepts their agreement, on the division of the following property.
- (a) Wife shall be awarded all the personal property in her residence at 8213 North Highway 23, Walkerton, Indiana, the 1995 Pontiac Grand Prix, an arrow sign, antique bell, cedar chest, picture of Aunt Annie, Christmas ornaments, Great Aunts' green pitcher, and any bank accounts in her name.
 - (b) Husband shall be awarded all of the personal property in Husband's residence, the 1991 Dodge pickup truck, the 1996 Buick LeSabre, his tools, the heavy equipment, the stock trailer, cattle, and all other farming equipment located at 8213 North Highway 23, Walkerton, Indiana.
- (17) Wife is awarded her residence at 8213 North State Road 23, Walkerton, Indiana. In order to balance the equities between the parties, Husband shall pay Wife an amount equal to the balance of the mortgage on said property as of August 1, 2006. The Husband is required to pay the monthly mortgage payments to First Federal until August 1, 2006, or until he satisfies his obligation in this paragraph. Husband shall maintain any related mortgage life insurance. If the Husband has elected not to pay the balance of the mortgage on or before August 1, 2006, then he shall pay a lump sum to Wife equal to the amount of the mortgage on August 1, 2006. Thereafter, Husband shall execute a quit-claim deed from Husband to Wife for said property. Until the mortgage is paid in full, Husband shall continue to pay the taxes and insurance.
- (18) Wife shall be responsible for the cost of the upkeep of her residence, together with the payment of all utilities.
- (19) Wife is awarded all the personal property located inside her residence, together with the 1995 Pontiac Grand Prix, an arrow sign, antique bell, cedar chest, picture of Aunt Annie, Christmas ornaments, Great Aunt's green pitcher, and any bank accounts in her name.
- (20) Husband is awarded all of the personal property in his residence, the 1991 Dodge pickup truck, the 1996 Buick LaSabre, his tools, all of the heavy equipment, including the backhoe, the stock trailer, cattle, all other farming equipment located at 8213 North Highway 23, Walkerton, Indiana, and his pension.
- (21) Husband shall be responsible for the payment of Wife's outstanding health care bills, her J.C. Penney debt in the approximate amount of \$400.00, and shall maintain health care insurance on Wife until he pays off the mortgage at her residence, pursuant to paragraph 17.
- (22) The parties shall exchange and execute any and all documents required to comply with this Decree.

- (23) The parties are equally responsible and shall each clean up the property to be in compliance with the demands of the Starke County Planning Commission on or before August 1, 2006. Husband is required to remove all the property awarded to him that is located at 8213 North State Road 23, Walkerton, Indiana, whether it is in the barn or in any open area, on or before August 1, 2006.
- (24) Each party is awarded any cash surrender value on any life insurance policy on his or her own life.
- (25) Husband is awarded any bank account in his name.
- (26) The Court makes no award of the logo inasmuch as same has not been copyrighted, and therefore, is not property.

CONCLUSIONS OF LAW

- (1) The parties have been married for over four decades and have each contributed income to the household from various sources. During some periods, Wife made the greater contribution. During other periods, Husband made the greater contribution. In 1989, the parties filed bankruptcy. The Court finds that, while married and residing together, the parties equally contributed to the household income and the acquisition of assets.
- (2) Consequently, in applying I.C. 31-15-7-5(1) and (2), the Court has considered:
 - (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing, and
 - (2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift.The Court finds that the parties have contributed equally to the acquisition of the property. Therefore, the presumption of an equal division remains after considering only the factors in I.C. 31-15-7-5(1) and (2).
- (3) However, the Court finds that the Wife has met her burden of presenting relevant evidence that rebuts the presumption of an equal division of the marital property. The Court has considered the factors contained in I.C. 31-15-7-5(3), (4) and (5), and finds that an unequal division of marital property is appropriate.
- (4) In considering the factor in I.C. 31-15-7-5(3), the Court has reviewed the economic circumstances of each spouse at the time the disposition of the property is to become effective. The Court finds that the economic circumstances of the Wife are significantly worse than the economic circumstances of the Husband. The Wife is elderly, in poor health, and will need to survive on Social Security and very limited income, if any, should she be able to sell any real estate. The Husband is elderly, but is in better health, will be

warded farm equipment, heavy equipment, and tools that can be used to earn income. He also is awarded 100% of his pension valued at \$4,500.00 annually. The Husband's economic circumstances are much better than those of the Wife.

- (5) In considering the factor in I.C. 31-15-7-5(4), the Court has reviewed the conduct of the parties during the marriage as related to the disposition or dissipation of their property. The Husband has maintained an open and exclusive relationship with another woman for the last seventeen (17) years. The Court finds from the evidence, that the Husband diverted marital income to maintain this relationship.
- (6) The Court has considered all of the factors in I.C. 31-15-7-4 when dividing the marital property in a just and reasonable manner.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the parties' marriage is dissolved and their property and debts shall be divided as stated above.

(Appellant's App. at 5-11) (emphases removed).

DISCUSSION AND DECISION

William appeals because, in response to our memorandum decision asking for "an explanation regarding the division of the marital assets," (Appellant's Br. at 3), the trial court entered "finding of fact number ten [which] introduces a substantial new theory not found in the Original Decree." (*Id.*) Finding number ten discusses William's dissipation of marital assets. Because of that finding, William asserts the court's new order violated the law of the case doctrine.¹ We disagree.

¹ Darlene has not filed an appellee's brief. In such a situation, we will not undertake the burden of controverting the appellant's arguments, as that job properly rests with the appellee. *Bergman v. Zempel*, 807 N.E.2d 146, 149 (Ind. Ct. App. 2004). However, neither are we relieved of our "obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required." *Vukovich v. Coleman*, 789 N.E.2d 520, 525 n.4 (Ind. Ct. App. 2003). If the appellant demonstrates *prima facie* error, we may reverse the trial court's decision. *Bergman*, 807 N.E.2d at 149. *Prima facie* means "at first sight, on first appearance, or on the face of it." *Id.*

Under the law of the case doctrine, an appellate court's determination of a legal issue is binding both on the trial court on remand and the appellate court on a subsequent appeal, given the same case with substantially the same facts. All issues decided directly or implicitly in a prior decision are binding on all subsequent portions of the case. The doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided. The doctrine is based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter.

Humphreys v. Day, 735 N.E.2d 837, 841 (Ind. Ct. App. 2000).

Contrary to William's assertion, finding number ten does not conflict with any issue "decided directly or implicitly" in our prior decision. *Id.* Rather, that finding, in addition to the others added by the trial court's modification, did expressly what we asked the trial court to do. It explained why the court's division of the assets, which we now know was intended to be unequal, was just and reasonable.²

Accordingly, we affirm.

RILEY, J., and BAILEY, J., concur.

² Nor do we find merit in William's allegation the court's order was an improper "modification" of a dissolution decree. The cases he cites to support his argument that the trial court was to "clarify" and not modify the prior decree are distinguishable. Both involved a trial court's modification of its own order on petition by one of the parties after the judgment was to have taken effect. *See Hurst v. Hurst*, 676 N.E.2d 413 (Ind. Ct. App. 1997) (court erroneously modified the distribution of assets, rather than simply clarifying the distribution, following a wife's "Petition to Clarify" the dissolution order); *Joachim v. Joachim*, 450 N.E.2d 121 (Ind. Ct. App. 1983) (court modified Husband's liability under the dissolution order following a husband's "Petition for Instructions"). Here, by contrast, we ordered the trial court to add findings sufficient to justify its division of assets. Accordingly, the trial court did not improperly modify its final judgment.